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Nevada Property 1 LLC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEVADA PROPERTY 1 LLC d/b/a THE COSMOPOLITAN OF LAS VEGAS	Case Nos. 28-CA-199763 28-CA-199766 28-CA-206206
and	
	REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501	

Respondent Nevada Property 1 LLC d/b/a The Cosmopolitan of Las Vegas ("The Cosmopolitan" or "Respondent") hereby replies to the General Counsel's Response to Respondent's Motion for Summary Judgment and submits that the General Counsel has failed to demonstrate the existence of any genuine issues of material fact precluding the resolution of this case by way of summary judgment. As the material facts and controlling law establish that The Cosmopolitan has not violated the National Labor Relations Act ("NLRA" or "Act'), summary judgment should be granted by the Board in Respondent's favor.

I. NO EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT.

In his Response, the General Counsel asserts The Cosmopolitan is asking the Board to adopt a different standard for resolving motions for summary judgement than provided for in 29 C.F.R. §102.24. Response at 4. To the contrary, The Cosmopolitan seeks the Board to faithfully apply 29 C.F.R. §102.24 as written. While the General Counsel's response/opposition need not

be supported by affidavits or other documentary evidence, the General Counsel must nonetheless show there is a genuine issue for hearing as the Board may deny such a motion either where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist. 29 C.F.R. §102.24.[1] Any suggestion by the General Counsel that he has no burden to identify genuine issues of material facts warranting a hearing is both contrary to the Board's rules and, as noted by former Member Miscamarra, contrary to common sense. L'hoist N. Am. of Tennessee, Inc., 362 N.L.R.B. No. 110, at 1 (June 5, 2015) (M. Micamarra, concurring).[2] When opposing a motion for summary judgment, it does not suffice for the General Counsel to promise evidence will be adduced at trial demonstrating that a complaint's allegations have merit. Otherwise, the Board would never have occasion to grant a respondent's motion for summary judgment because in every case in which the General Counsel has decided to issue a complaint, he believes he ought to prevail. Lhoist, 362 N.L.R.B. No. 110, at 1 (M. Micamarra, concurring).

Further, the General Counsel argues that the Respondent's Motion "itself establishes . . . genuine issues of material fact" with respect to claims pertaining to three employee handbook rules due to the utilization of "affidavits explaining its asserted business justifications for its rules" Response at 5. However, the Board has expressly rejected such a contention. See Western Electric Company, 198 N.L.R.B. 623, 624 (1972) (finding that where respondent filed motion for summary judgment with affidavits and accompanying exhibits setting forth additional facts, the General Counsel must directly contest the accuracy of respondent's affidavits and not just argue that their

[1] See also NLRB Procedural Rules, 54 Fed. Reg. 38515, 38516-17, 1989 WL 295601 (Sept. 19, 1989) (final rule revising NLRB's summary judgment procedures and discussing application of same).

[2] See also Trinity Tech. Grp. Inc., 364 N.L.R.B. No. 133, at 1 (M. Miscamarra, concurring) (addressing General Counsel's incorrect presumption that motion for summary judgment should be denied merely because one party denies liability or because General Counsel disagrees with respondent's version of events).

submission demonstrates need for evidentiary hearing). Because the Board's rules provide that it is to grant summary judgment motions in the absence of genuine issues as to material facts, the Board requires the General Counsel to offer at least "some preview of the evidence to be presented at trial that conflicts with the material facts set forth in the respondent's sworn affidavit. L'Hoist, 362 NLRB No. 110 (M. Miscimarra, concurring).[3]

Having failed to demonstrate the existence of any genuine issues of material facts, all that is left is for the Board to apply the applicable law.

II. RESPONDENT'S EMPLOYEE HANDBOOK RULES ARE LAWFUL.

Both the General Counsel and Respondent agree that the Board's decision in Boeing sets forth the current applicable standards for assessing the lawfulness of facially neutral policies. Further, Respondent admits maintaining the challenged rules. As there is no genuine dispute as to the material facts set forth by the Respondent in its Motion, the Board may proceed to resolve the legal issues by way of summary judgment.

In adopting the current standard for assessing the lawfulness of facially neutral policies, the Board rejected the false premises underlying the now defunct Lutheran Heritage analysis, "the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks." The Boeing Co., 365 N.L.R.B. No. 154 at *2 (Dec. 14, 2017). Further, the Board recognized that "[e]mployees are disadvantaged when they are

[3] The General Counsel also argues that some of Respondent's evidence related to its employee handbook rules was not presented during its investigation. Response at 5. Yet, it was the General Counsel's Region 28 Office that ignored the current NLRB General Counsel, Peter Robb's mandatory instructions to send such issues, along with issues involving the application of the Board's Total Security decision to discretionary discipline, to the General Counsel's Office of Advice for direction before proceeding further. See GC Memorandum 18-02 (Dec. 1, 2017). It was also the General Counsel's Region 28 Office that failed to undertake any additional investigation after the Board changed the applicable law for evaluating facially neutral employee rules in its Boeing decision.

denied general guidance regarding what standards of conduct are required and what type of treatment they can reasonably expect from coworkers." Id. "In this respect, Lutheran Heritage has required perfection that literally is the enemy of the good." Id.

A. Expectation of Cooperation With Company Investigations.

In terms of Respondent's expectation that employees will cooperate with all Company investigations, its scope is framed by the safeguards associated with its location in the Standards of Conduct portion of Respondent's CoStar Guidebook and by the limiting language found at the bottom of page 16 expressing that noting in the Standards of Conduct policy is intended to interfere with employees' rights under federal or state laws, including the National Labor Relations Act. Motion at 15-16, Exhibit 6, Espino Affidavit at ¶¶ 8, Exhibit 1, CoStar Guidebook at 15-17. To require the Respondent to go further and draft a lengthy rule that correctly anticipates and carves out every conceivable overlap with NLRA coverage is the type of misguided belief the Board expressly rejected in Boeing. When this facially neutral rule is reasonably interpreted, it would not prohibit or interfere with the exercise of NLRA rights. Indeed, maintenance of such a rule is lawful without any need to evaluate or balance business justifications. See Boeing, 365 N.L.R.B. No. 154 at *17.

It is also important to note that the Board recently informed the United States Court of Appeals for the District of Columbia Circuit that it no longer sought enforcement of its decision in Grill Concepts Services, Inc., 364 N.L.R.B. No. 36 (2016) as it pertains to seven employer rules, including one pertaining to the "failure to participate in or intentional falsification of a statement during a formal company investigation," and requested the case be remanded so it could reconsider those rules under the Board's new Boeing test. See Grill Concepts Servs., Inc. v. NLRB, No. 16-1238, Judgment (D.C. Cir. Jan. 29, 2018); Grill Concepts Servs., Inc., 364 N.L.R.B. No. 36 (2016). The failure to participate in investigations rule at issue in Grill Concepts, as not one of the five

challenged by the employer on review and did not contain the type of savings clause used by the Respondent.

B. Walking Off the Job During Assigned Working Hours.

In challenging the Respondent's rule pertaining to walking off the job during assigned working hours without approval or authorization, the General Counsel cites to pre-Boeing case law in which the Board gave special solicitude to terms like "walk out" and "walking off the job," finding them to be synonyms with the word "strike." See Response at 7-8; see also NLRB General Counsel Memorandum 15-04 (Mar. 18, 2015) (Former General Counsel Griffin discussing Board's then-treatment of the terms such as "walking off the job"). Yet, rules with similar terms "[l]eaving a department plant during a working shift without a supervisor's permission," or "[s]topping work before [the] shift ends" were upheld by the Board. See 2 Sisters Food Group, Inc., 357 N.L.R.B. 1816, 1817–18. (2011). This type of treatment given to similar terms is the same as the Board's application of Lutheran Heritage standard to cast disfavor on certain words like "respect" and "courtesy," in favor of similar words like "appropriate business decorum," which was expressly rejected by the Board in Boeing, for a myriad of reasons, including the appearance of arbitrariness, extensive confusion, and the inability of anyone to understand what the lawful rule did correctly and what the unlawful rule did incorrectly. See Boeing, 365 N.L.R.B. No. 154 at *11-14.

Respondent's rule is not facially overbroad and cannot be reasonably interpreted to restrict employees in exercising their right to strike under the Act, particularly given the savings language at the bottom of page 16, which reinforces its intended, lawful scope.

C. Limiting Use of Stickers, Buttons, or Decals Absent a Legal Right.

The Respondent's maintenance of a rule limiting the wearing of stickers, buttons, decals and the like, is not an absolute ban on the wearing of such items where an employee has a legal right to do so. Motion at 17-18, Exhibit 6, Espino Affidavit at ¶ 10, Exhibit 1, CoStar Guidebook

at 19-22. It places no express restrictions on the wearing of union insignia and recognizes the existence of situations where employees would have a legal right to wear stickers, buttons, decals, etc. Indeed, Respondent's rule contains a reiteration of the fact that "[t]he Company administers this policy in compliance with all state and federal laws." Id. Further, the General Counsel concedes, as he must, that not all forms of union insignia and buttons are protected by the NLRA as employers can establish the existence of "special circumstances" justifying restrictions on the same. Response at 8-10. It would be impossible and ineffective for the Respondent to draft a lengthy rule that correctly anticipates and carves out every conceivable overlap with NLRA coverage and something not required under Boeing.

III. RESPONDENT DID NOT MAKE UNLAWFUL UNILATERAL CHANGES.

A. Eliminating One Signature From the Emergency Drop Form Was Insignificant.

There is no genuine dispute of material fact concerning Respondent's Emergency Drop Form. It is undisputed that Respondent's change to the form in December 2016 resulted in a slot technician having to obtain one less signature. The General Counsel does not offer concrete facts as to any increased discipline stemming from the change, just conjecture. As there is no evidence that the change was material, substantial, and significant, summary judgement in the Respondent's favor is warranted.

B. Deferring to Managers When Rebooting Machines Is Not a Unilateral Change.

The General Counsel mischaracterizes Manager Lebienow's September 4, 2017 email concerning the rebooting of slot machines. Response at 12. The General Counsel contends that the email (which speaks for itself) provides that "guest service representatives could no longer perform this function without the authorization of the shift manager." Id. Rather, the email as written pertains to slot technicians not asking or suggesting to guest service representatives that they reboot machines, *on the slot technicians' own initiative*, but to defer such decisions to slot

managers. Motion, Exhibit 1, 11/6/17 Position Statement at PS Exhibit 16. The General Counsel does not refute or challenge Respondent's evidence as how slot technicians are to handle floor calls. Motion at Exhibit 1, Respondent's 11/6/17 Position Statement, PS Exhibit 4, Slot Technician Job Description; PS Exhibit 5, Slot Operations Technical Expectations Memo Excerpt at 2. Thus, the undisputed material facts demonstrate slot technicians are not privileged to suggest guest service representatives reboot slot machines on their own initiative.

C. Preventative Maintenance Is a Slot Technician Job Function.

The General Counsel does not dispute that preventative maintenance is within the compass of job duties of slot technicians. Response at 11-12. As evidenced by Respondent's Slot Technician Job Description and Slot Operations Technical Expectations Memo, one of the essential responsibilities of Slot Technicians is performing preventative maintenance ("PM") of all slot machines, including cleaning machines. Motion Exhibit 1, Respondent's 11/6/17 Position Statement, PS Exhibit 4, Slot Technician Job Description; PS Exhibit 5, Slot Operations Technical Expectations Memo Excerpt at 2. What the General Counsel challenges is how Manager Liebenow decided to assign such work in September 2017. Response at 11. However, the Board has established that work orders not exceeding the compass of employees' job duties fall within the normal area of detailed day-to-day operating decisions relating to the manner in which work is be performed and, thus, do not rise to the level of an unlawful unilateral change. Little Rock Downtowner, Inc., 148 N.L.R.B. 717, 719 (1964).

IV. THE COSMOPOLITAN'S ACTIONS DO NOT AMOUNT TO A FAILURE TO BARGAIN.

There is no dispute that The Cosmopolitan offered the Union the ability to view the surveillance video at issue on property and offered to bargain with the Union over also providing the surveillance footage in CD form. See Response at 14-15; Motion Exhibit 3, Respondent's 7/18/17 Position Statement, PS Exhibit 17, Emails between Keller and Million (including January

24, 2017 and January 25, 2017). Rather, the General Counsel sets forth reasons why a CD version is more desirable to the Union. The undisputed fact remains that the Union did not bargain over the issue or raise such arguments with the Respondent. Thus, the Respondent cannot be said to have failed to bargain with the Union. Further, while the General Counsel asserts Respondent offered no justification for its position, the email evidence submitted by the Respondent shows that it raised confidentiality concerns given the sensitive nature of the video footage. See e.g., Motion Exhibit 3, Respondent's 7/18/17 Position Statement, PS Exhibit 17 (Keller Emails to Million of January 23, 2017, January 24, 2017, and February 7, 2017).

With respect to the issue of bargaining over the final written warning, the General Counsel ignores the express holding of Total Security Management, which requires notice and opportunity to bargain prior to a disciplinary action only if it is a serious action, "such as suspension, demotion, and discharge" and excludes "other actions that may nevertheless be referred to as discipline and that are rightly viewed as bargainable, such as oral and written warnings, [but that] have a lesser impact on employees, viewed as of the time when action is taken and assuming that they do not themselves automatically result in additional discipline based on an employer's progressive disciplinary system." 364 N.L.R.B. No. 106, at *3-4 (Aug. 26, 2016). The General Counsel offers no concrete facts to refute Respondent's evidence establishing first written warnings do not automatically result in additional discipline based on its progressive disciplinary system.

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V. CONCLUSION.

Based on the foregoing reasons, The Cosmopolitan respectfully requests summary judgment be granted in its favor as to all claims in the Amended Second Consolidated Complaint.

DATED this 20th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2018, I did serve a copy of the **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** upon:

National Labor Relations Board
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VIA ELECTRONIC FILING

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VIA ELECTRONIC MAIL AND CERTIFIED MAIL WITH RETURN RECEIPT

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An employee of Kamer Zucker Abbott